Filed 7/28/09 P. v. Robles CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MARTIN HERRERA ROBLES,

Defendant and Appellant.

F056181

(Super. Ct. No. MF47039B)

OPINION

APPEAL from a judgment of the Superior Court of Merced County. Carol K. Ash, Judge.

Hilda Scheib, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Martin Herrera Robles and codefendant Gabriel Guerrero Reyes were convicted of possessing methamphetamine for sale and transporting methamphetamine for sale. On appeal, defendant contends (1) the trial court erred by denying his motion to sever his trial from codefendant's trial and (2) CALCRIM No. 416 unconstitutionally removed an issue from the jury's consideration and was otherwise flawed. We will affirm.

PROCEDURAL SUMMARY

On January 29, 2008, the Merced County District Attorney charged defendant and codefendant with transportation of methamphetamine between noncontiguous counties for the purpose of sale (Health & Saf. Code, § 11379, subd. (b); count 1) and possession of methamphetamine for sale (Health & Saf. Code, § 11378; count 2). The information further alleged as to both counts that defendant was personally armed with a firearm (Pen. Code, § 12022, subd. (c)), and sold or possessed for sale 28.5 grams or more of methamphetamine or 57 grams or more of a substance containing methamphetamine (Pen. Code, § 1203.073, subd. (b)(2)).

On the first day of trial, the trial court denied defendant's motion to sever his trial from that of codefendant. The jury found defendant and codefendant guilty as charged.

The trial court sentenced defendant to nine years in prison—the middle term of six years on count 1, plus three years on the firearm enhancement. The court stayed the term imposed on count 2 (Pen. Code, § 654).

FACTS

At about 11:00 p.m. on September 19, 2007,[1] Los Banos police officers received information from a confidential informant that two people were transporting

[1] All dates refer to 2007 unless otherwise noted.

methamphetamine into Los Banos.[2] The informant provided a description of a pickup truck, the truck's occupants, and part of the truck's license plate number. Officers located the truck in Los Banos and stopped defendant and codefendant, who matched the descriptions given. Defendant was driving the truck and was its registered owner.[3]

The officers searched the truck, an extended cab model. Inside, they found two semiautomatic handguns—a loaded .45 caliber Smith and Wesson in a holster under the driver's seat and an unloaded .38 caliber Colt in a case under the right rear seat. The .45 caliber gun had special grips and the engraved initials "MH."[4] The guns were registered to people other than defendant and codefendant. The bed of the truck contained a lawn mower and a leaf blower. The officers found two pounds of methamphetamine in a plastic bag inside the lawn mower's grass catcher, as the informant had predicted. No paraphernalia for consuming the methamphetamine was found. Defendant was carrying about $1,300 in cash. No cell phone was found in the search.[5] The officers arrested defendant and codefendant, who were both from Moreno Valley in Riverside County, and put them in separate jail cells.

The next day at about 2:00 p.m., Investigator Llanez interviewed defendant and codefendant together. Llanez first asked codefendant about his involvement with the drugs, and codefendant said "he had come to Los Banos to bring two pounds of [methamphetamine]." He originally had one pound and he went to San Diego to buy the

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2 A few days earlier, the informant had spoken by phone to someone who identified himself as Gabriel.

3 The People's factual summary states that *codefendant* was driving that night. The transcript page cited by the People clearly states that defendant was the one who said he was driving that night.

4 The investigator testified that Hispanics typically use their mother's maiden name as a secondary last name.

5 The investigator testified that drug dealers usually dispose of their cell phones before they are apprehended. Cell phones are not usually found.

other pound. He left a cash deposit in San Diego and was to pay $22,000 total for the methamphetamine. He was going to sell the two pounds for $26,000. He had met with the informant in Los Banos about a week earlier. Codefendant's demeanor during the interview was very confident and cocky, and he did not accuse anyone else of any involvement.

Defendant, on the other hand, was very depressed and down during the interview. When Llanez asked him what his involvement in the drug deal was, defendant said "it was his first time," and "he deserved a break." Llanez asked him about guns, and defendant said he had a firearm inside the vehicle under the driver's seat. He said he had been the driver of the vehicle that night.[6]

In Llanez's expert opinion, the facts of this case demonstrated possession of methamphetamine for the purpose of sales. In September, a pound of methamphetamine was worth about $12,000 to $15,000.

Defense Evidence

Codefendant

Codefendant testified that on September 19, he lived in Moreno Valley, renting from and living with defendant's brother. Codefendant had previously worked full-time as a drywall installer, but then he could get little work in the construction industry. In August and September, he did not have much money and could not pay his bills.

Codefendant met defendant through defendant's brother, but codefendant did not speak to defendant much. Codefendant agreed to go with defendant on September 19 to

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6 The People's factual summary states that defendant made a similar statement to Llanez, admitting he brought the two pounds of methamphetamine to Los Banos after a trip to San Diego to pick up the additional pound. As far as we can discern, defendant never said this. The People cite to portions of the record containing statements made by *codefendant*, not defendant. Although defendant failed to deny his involvement in the drug deal, his actual statements were limited to those we include here.

see some tractors (or trucks or trailers). Defendant said he would pay him $1,000 to go with him.

Codefendant knew defendant had a handgun because sometimes he would arrive at his brother's house with the gun. Defendant said he carried the gun because he was a truck driver.

On September 19, defendant had his gun and his cell phone with him. A lawn mower and leaf blower were in the back of the truck. Codefendant had never seen the equipment before and he thought defendant used it to cut the grass at his house. Codefendant did not know there were illegal drugs in the grass catcher. If he had known, he would not have gone with defendant.

Before they reached Los Banos, defendant received a call. He asked codefendant to speak to the caller to find out which exit to take to Los Banos. Codefendant did not know who he was talking to on the cell phone. In Los Banos, they stopped in the Wal-Mart parking lot. Codefendant wanted to buy some pills because his stomach was upset, but he did not go into the store. He got out of the truck to urinate, but he could not, so he got back in the truck. Defendant stayed in the truck. Defendant then drove the truck to a roadside location. Codefendant had no idea why defendant stopped there. Codefendant again got out of the truck to urinate, but he could not, so he got back in the truck. Defendant stayed in the truck and talked on the cell phone. They left after a minute or two and drove a block or so before the police stopped them.

Codefendant said their interview with Llanez occurred at 2:30 in the morning, not in the afternoon. Llanez asked them where they were from, and they told him they were from Moreno Valley. Llanez told them they were under arrest for possession of drugs and weapons, and then he asked them who the drugs and weapons belonged to and where they came from. Codefendant told Llanez he did not know anything about the drugs and he knew about only one weapon. Codefendant did not hear defendant answer this question, nor did he hear him say that he had never done anything like this before or that

he was bringing drugs to sell in Merced County. Codefendant did not make a statement about bringing drugs either. He denied making the statements that Llanez testified he had made.

Cross-examination by Prosecutor

On cross-examination, codefendant testified that defendant was going to pay him $1,000 to accompany him to look at "a tractor of a trailer that he wanted to buy." Codefendant did not think it was strange for someone he hardly knew to pay him $1,000 to go look at tractors because "if I don't have work I can say to a friend to accompany me, and I can pay him." The prosecutor asked, "So now he's your friend?" Codefendant responded, "He's not my friend."

On September 19, defendant picked up codefendant at defendant's brother's house. They went to look at some tractors. Then defendant asked codefendant to go with him to Northern California to see some more tractors. Defendant said they would come back early. The lawn mower was in the back of the truck.

Defendant did not tell codefendant why he was driving around Los Banos. He did not tell codefendant anything. Codefendant never saw anyone approach the truck. After codefendant tried to urinate and they drove away, the police stopped the truck. He and defendant were separated and he never spoke to him about the drugs, but he remembered in the interview with Llanez that defendant said it was his first time and he deserved a break. Codefendant thought defendant was talking about "his pistol or something." Codefendant denied telling Llanez that he went to San Diego to pick up drugs and brought them to Los Banos, or that he met with an informant. He had never been to Merced County until he was arrested.

Cross-examination by Defendant

Codefendant denied ever seeing or meeting with the informant. Codefendant did not have a cell phone with him on the trip, and he did not see what defendant did with his cell phone before the police stopped them. Codefendant denied ever buying drugs. He

did not know where Llanez got his confession because he did not say it. He denied that the second handgun was his; he had never seen it before.

Codefendant did not think it was odd that defendant offered him $1,000 to accompany him to look at some tractors, even though codefendant was not an expert in tractors and defendant had never given him money before. Codefendant noticed the lawn mower in the truck when they left, but he lived with defendant's brother and he did not mistrust defendant or his brother.

Recross-examination by Prosecutor

Defendant told codefendant they would return home in the early morning hours. Codefendant did not ask him where they were going when they got on Interstate 5 and headed north. Codefendant was not curious because he thought they were going to look at a tractor, even though they arrived around midnight. Codefendant was not an expert on tractors and had no special skill at negotiating the purchase of tractors, but he was with defendant because defendant was alone and maybe did not want to be alone.

Defendant

In September, defendant was a truck driver. He knew codefendant because he lived with defendant's brother, but they did not talk to each other a lot. On September 19, codefendant asked defendant to give him a ride to Northern California via Interstate 5. Codefendant did not say why he needed to go to Northern California. Codefendant was going to pay defendant $1,000 for the ride. Defendant thought it seemed "kind of strange," but he needed the money to pay child support. Codefendant had friends in Northern California he was going to get together with.

Defendant drove his brother's truck. Defendant did not know how the lawn mower and leaf blower got in the back of the truck. They were not his, he had not seen them before, and he did not see anyone load them in the truck. Codefendant told defendant where they would meet in Pomona. Defendant thought someone put the lawn mower and blower in the truck after they met in Pomona.

They stopped at Wal-Mart in Los Banos so codefendant could meet his friend. Only codefendant got out; defendant stayed in the truck. Defendant could not see the friend because it was dark. The friend told them to follow him. When they did, they were stopped by the police. Defendant never got paid the $1,000 he was promised.

Defendant admitted again at trial that the gun under the driver's seat was his. He had owned it for many years. But he did not know the other gun was in the truck. He saw the case, but did not know what was in it. That gun was not his. Defendant said he had never been in trouble with the law before this incident. He had never stolen anything and he had always worked hard for his money by driving a truck and making furniture.

When Llanez interviewed them, Llanez asked defendant if he was involved with a drug deal. Defendant denied any involvement in a drug deal, but he knew he was in trouble because of his gun. That was the reason he said he deserved a break—it was the first time he had been in trouble with the police with the gun.

Cross-examination by Prosecutor

On cross-examination, defendant said he had never been to Merced County prior to September 19. Defendant did not recall Llanez asking him what his role was in the drug deal, but two days before his current testimony, at a hearing under oath, the prosecutor asked defendant about his statement to Llanez: "[T]he officer asked you what your role in the drug deal was, and you said, I've never done this before, this is my first time, I deserve a break[.]" Defendant responded, "I did say that." Defendant explained that when he said that at the hearing, he was referring to the gun because that was "the first time they had found [him] with someone who had drugs, not that [he] had them." When Llanez asked him specifically what his role in the drug deal was, he did not understand what Llanez was asking. And defendant did not remember testifying two days earlier that he "did say that."

When codefendant offered to pay defendant $1,000, defendant did think it was a lot of money for a ride. He did not see codefendant put the lawn mower in his truck, but

he knew it was put there in Pomona. Defendant never told codefendant he would pay him $1,000 to go with him to look at tractors.

Defendant admitted the gun engraved with his initials and found under his seat was his gun. He believed the gun worked, but he had never used it. He had never seen the other gun before, although he did see the case in the back seat. He did not see codefendant put it in the truck and he did not ask him about it. The first time defendant noticed the case was after codefendant got in the truck.

When they stopped at Wal-Mart in Los Banos, defendant did not get out of the truck. He reclined his seat because he thought they would be there for a while. Codefendant got out of the truck and spoke to his friend.

Cross-examination by Codefendant

Defendant agreed to drive codefendant to Los Banos for $1,000. The truck defendant drove to Los Banos belonged to his brother, but it was registered to defendant because his brother did not have a license. Before defendant and codefendant started on the trip, a lawn mower and blower "appeared" in the back of defendant's truck and a case of some kind "appeared" under his back seat. Defendant did not know there was a gun in the case. Defendant owned the gun under the driver's seat. He had paid about $700 or $800 for it about 10 years earlier, then later had custom handles added for about $500. Defendant took the gun along on September 19 because it was nighttime and he thought he might need it for protection on the way. He liked to own a gun even though he did not have enemies.

Defendant took his cell phone on the trip to Los Banos. He did not make any calls on it, but codefendant borrowed the phone to make calls regarding meeting a friend. Defendant said he still owned the cell phone.

The lawn mower and blower "appeared" in the truck in Pomona. Defendant did not see codefendant put them in the truck and he did not ask about them. Codefendant

told him he was going to Northern California to work, although he did not specify what he did. Defendant assumed the lawn mower and blower belonged to codefendant.

Defendant had $1,229 in his possession on September 19. He was going to make a child support payment the following week. He always made those payments in cash.

DISCUSSION

I. Severance Motion

Defendant asserts that the trial court should have granted his motion to sever his trial from codefendant's trial. Defendant maintains that severance was required because he and codefendant had conflicting defenses. Defendant explains that codefendant's statement to the officers—in which he described buying the methamphetamine and bringing it to Los Banos to sell—coupled with the evidence that defendant was driving the truck with codefendant as a passenger, created a great likelihood that the jury would infer defendant was guilty. We do not believe severance was required in this case.

"The Legislature has expressed a preference for joint trials. [Citation.] [Penal Code s]ection 1098 states that multiple defendants jointly charged with a felony offense 'must be tried jointly, unless the court order[s] separate trials.' This rule applies to defendants charged with '"common crimes involving common events and victims."' [Citations.]" (*People v. Carasi* (2008) 44 Cal.4th 1263, 1296.) Indeed, "[d]efendants 'charged with common crimes involving common events and victims' present a '"classic case"' for a joint trial. [Citation.]" (*People v. Tafoya* (2007) 42 Cal.4th 147, 162.) "However, separate trials *may* be ordered in the face of antagonistic defenses. [Citation.] [S]uch conflict exists only where the acceptance of one party's defense precludes the other party's acquittal. [Citations.]" (*People v. Carasi, supra,* at p. 1296.) "'"[A]ntagonistic defenses do not *per se* require severance, even if the defendants are hostile or attempt to cast the blame on each other." [Citation.] "Rather, to obtain severance on the ground of conflicting defenses, it must be demonstrated that the conflict is so prejudicial that [the] defenses are irreconcilable, and the jury will unjustifiably infer

that this conflict alone demonstrates that both are guilty." [Citations.]' [Citations.] … [But] '[w]hen ... there exists sufficient independent evidence against the moving defendant, it is not the conflict alone that demonstrates his or her guilt, and antagonistic defenses do not compel severance.'" (*People v. Tafoya, supra,* at p. 162.)

"We review the denial of severance for abuse of discretion—a deferential standard based on the facts as they appeared when the ruling was made. [Citations.] A ruling that was correct when made will stand unless joinder causes such '"'gross unfairness'"' as to violate defendant's due process rights. [Citation.]" (*People v. Carasi, supra*, 44 Cal.4th at p. 1296.) "Even if the court abused its discretion in refusing to sever, reversal is unwarranted unless, to a reasonable probability, defendant would have received a more favorable result in a separate trial. [Citation.]" (*People v. Avila* (2006) 38 Cal.4th 491, 575.)

At the time of the motion to sever in this case, there was strong evidence of defendant's guilt independent of the evidence against codefendant. Defendant drove the truck that was transporting two pounds of methamphetamine in a lawn mower. The truck also contained a leaf blower to complete the appearance of a legitimate purpose. Defendant carried a loaded weapon under his seat. He admitted the gun was his. When asked about his involvement in the drug deal, he said it was his first time and he deserved a break; he did not deny his involvement in the drug deal.[7] In this case, antagonistic defenses did not dictate severance. (See *People v. Tafoya, supra*, 42 Cal.4th at p. 162.)

Furthermore, even if the trial court abused its discretion by refusing to sever the cases, there is no reasonable probability defendant would have received a more favorable result in a separate trial. Even in the absence of codefendant's statement to Llanez and

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[7] Defendant's claim that it was unclear what he was referring to when he answered this question belies the record. The officer specifically asked about his involvement in *the drug deal*.

codefendant's testimony, the evidence against defendant was overwhelming and his explanation that codefendant would pay him $1,000 just for driving him to Los Banos, and that two pieces of large lawn equipment and a gun case mysteriously "appeared" in defendant's truck was simply not believable. Although his defense failed, it was codefendant's statement—which did not mention defendant or directly implicate him—that allowed defendant to point the finger at codefendant and claim that he was the one who had bought the methamphetamine and put it in the truck without defendant's knowledge. But, as we have explained, it was defendant's own statement and the events and circumstances of September 19 that implicated him. Accordingly, defendant has not demonstrated that the joint trial deprived him of his rights to a fair trial or due process. Thus, if there was error, it does not require reversal.

II. CALCRIM No. 416

Defendant next contends the trial court erred by instructing with CALCRIM No. 416 regarding an uncharged conspiracy. He argues the instruction impermissibly directed the jury to find that a conspiracy existed, thereby reducing the burden of proof and violating his constitutional rights to a jury trial and due process.

The trial court provided the following instruction:

> "The People have presented evidence of a conspiracy. A member of a conspiracy is criminally responsible for the acts or statements of any other member of the conspiracy done to help accomplish the goal of the conspiracy.
>
> "To prove that a defendant was a member of a conspiracy in this case, the People must prove that:
>
> "1. The defendant intended to agree and did agree with the other defendant to commit Transportation of Methamphetamine for Sale and Possession for Sale of Methamphetamine;
>
> "2. At the time of the agreement, the defendant and the other alleged member of the conspiracy intended that one or more of them would

commit Transportation of Methamphetamine for Sale and Possession for Sale of Methamphetamine;

"3. One of the defendants or both of them committed the following overt act to accomplish Transportation of Methamphetamine for Sale and Possession for Sale of Methamphetamine: transporting methamphetamine from Southern California;

"AND

"4. This overt act was committed in California.

"To decide whether a defendant committed this overt act, consider all of the evidence presented about the act[.]

"To decide whether a defendant and the other alleged member of the conspiracy intended to commit Transportation of Methamphetamine for Sale and Possession for Sale of Methamphetamine, please refer to the separate instructions that I will give you on one or more of those crimes.

"The People must prove that the members of the alleged conspiracy had an agreement and intent to commit Transportation of Methamphetamine for Sale and Possession for Sale of Methamphetamine. The People do not have to prove that any of the members of the alleged conspiracy actually met or came to a detailed or formal agreement to commit one or more of those crimes. An agreement may be inferred from conduct if you conclude that members of the alleged conspiracy acted with a common purpose to commit the crime.

"An *overt act* is an act by one or more of the members of the conspiracy that is done to help accomplish the agreed upon crime. The overt act must happen after the defendant has agreed to commit the crime. The overt act must be more than the act of agreeing or planning to commit the crime, but it does not have to be a criminal act itself.

"The People contend that the defendants conspired to commit one of the following crimes: Transportation of Methamphetamine for Sale and Possession for Sale of Methamphetamine. You may not find a defendant guilty under a conspiracy theory unless all of you agree that the People have proved that the defendant conspired to commit at least one of these crimes, and you all agree which crime he conspired to commit. You must also all agree on the degree of the crime.

"A member of a conspiracy does not have to personally know the identity or roles of all the other members.

> "Someone who merely accompanies or associates with members of a conspiracy but who does not intend to commit the crime is not a member of the conspiracy.
>
> "Evidence that a person did an act or made a statement that helped accomplish the goal of the conspiracy is not enough, by itself, to prove that the person was a member of the conspiracy."

Defendant asserts that the first sentence of the instruction informed the jurors that "credible evidence of a conspiracy [w]as in fact presented to them[,]" thereby removing the issue from their consideration and leaving only the determination of whether defendant was a member of that conspiracy. Defendant says the jurors consequently failed to decide whether evidence of a conspiracy had actually been presented to them, and necessarily concluded the fact of the conspiracy had been proven. He notes that the definition of a conspiracy, stated at the outset of analogous CALJIC No. 6.10.5, was not included in CALCRIM No. 416. He maintains that CALCRIM No. 416's description of the required elements was insufficient because those elements were "predicated on the premise that a conspiracy already exist[ed]" and the instruction never referred to an "alleged" conspiracy.

We disagree with defendant. The opening sentence of CALCRIM No. 416 acknowledged the existence of conspiracy *evidence*, it did not imply the prosecution had *met its burden* of proving the elements of a conspiracy beyond a reasonable doubt. Moreover, contrary to defendant's claim, the instruction frequently used the word "alleged" in describing the conspiracy and its members. This reinforced the notion that it was up to the jury to decide whether a conspiracy had been proven. Considering CALCRIM No. 416 in its entirety, we do not believe it removed an element from the jury's consideration.

Second, defendant complains that the instruction failed to inform the jury that the specific intent requirement is two-pronged—a specific intent *to agree to commit* the target offense and a specific intent *to commit* the offense. Defendant contends the

instruction failed "to make clear the duality of the intent requirement." We do not see any omission or ambiguity in this regard. The instruction clearly stated the two separate intents required in the first two elements, as follows: "1. The defendant *intended to agree* and did agree with the other defendant to commit Transportation of Methamphetamine for Sale and Possession for Sale of Methamphetamine;" and "2. At the time of the agreement the defendant and the other alleged member of the conspiracy *intended that one or more of them would commit* Transportation of Methamphetamine for Sale and Possession for Sale of Methamphetamine[.]" (Italics added.)

Finally, defendant argues that the instruction omitted the requirement that defendant personally intended *to sell* the contraband. Defendant has failed to consider the entirety of the instructions. CALCRIM No. 416 expressly referred the jurors to other instructions on the particular crimes charged, as follows: "To decide whether the defendant and the other alleged member of the conspiracy intended to commit transportation of methamphetamine for sale and possession for sale of methamphetamine, please refer to the separate instructions that I will give you on one or more of those crimes." The court immediately proceeded to instruct on the separate counts, stating that, for both counts, the People were required to prove that defendant intended to sell the methamphetamine. Specifically, on transportation for sale, the court stated as one of its elements: "When the defendant transported the controlled substance, he intended to sell it[.]" And on possession for sale, the court stated as one of its elements: "When the defendant possessed the controlled substance, he intended to sell it[.]" Together, the instructions fully addressed defendant's concern. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016 [correctness of instructions determined from the entire charge of the court, not individual instructions].)

DISPOSITION

The judgment is affirmed.

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Kane, J.

WE CONCUR:

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Wiseman, Acting P.J.

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Hill, J.